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NG KIM HOONG & ANOR v. TETUAN YH TEH & QUEK

HIGH COURT MALAYA, KUALA LUMPUR
ZALEHA YUSOF J
[JUDICIAL REVIEW NO: 17D-6-09-2013]
23 JULY 2014

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LEGAL PROFESSION: *Remuneration – Counsel's fees – Taxation of costs – Application for – Whether petitioners disputed legal fees claimed by respondent on percentage basis – Whether fees agreed upon initially between respondent and petitioners' deceased father – Whether agreement in relation to respondent's fees existed – Whether e-mail correspondences showed that petitioners had given their reaffirmation with regards to respondent's fees – Whether request for detailed bill of costs made within time period – Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd – Legal Profession Act 1976, ss. 116 & 126*

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The respondent was a firm of solicitors. In April 2011, the petitioners' father engaged the respondent to act on a matter pertaining to the compulsory acquisition of three lots of land belonging to the petitioners' father. The petitioners' father, however, passed away on 25 July 2012. Pending the grant of probate, the petitioners were appointed as representatives for the remaining land reference. The respondent continued

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to act as their solicitors and upon completion of the court hearing, the respondent served its bills dated 26 January 2013 on the petitioners. Pursuant to s. 126 of the Legal Profession Act 1976 ('the Act'), the petitioners filed an application on 31 July 2013 for the bills to be taxed. The respondent, however, contended that the petitioners' father had agreed

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to pay its legal fees which was equivalent to 2.5% of the compensation awarded by the court to the petitioners' father in relation to the land reference. This, as alleged, was agreed upon by the petitioners' father through the second petitioner as evidenced in an e-mail dated 23 May 2012. Further evidence was led to show that e-mails were exchanged between the

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parties in relation to the arrangement of the respondent's fees. On the other hand, the petitioners contended that the charging of the fees on the said percentage basis was against the law and there was no signed agreement pursuant to s. 116(1) and (2) of the Act. The Senior Assistant Registrar decided in favour of the petitioners and ordered the respondent to deliver their bill of costs to the petitioners and the said bill to be referred to the

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Deputy Registrar of the High Court to be taxed. Hence, this appeal. The issues that arose for consideration were (i) whether there was an agreement to pay the respondent its legal fees which was equivalent to 2.5% of the compensation received by the petitioners' father; and (ii) whether the petition was misconceived.

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Held (allowing appeal with costs):

(1) No formal agreement was entered into between the respondent and the petitioners' father. This fact could not be used as an argument to deny the respondent of its fees. Further, there was nothing in the Act which required a formal agreement to be entered and signed. The exchange of e-mails showed that there was an agreement to pay the respondent its legal fees which was equivalent to 2.5% of the compensation received by the petitioners' father. Based on the series of e-mails, there was no doubt that the petitioners had given their reaffirmation with regards to the agreement on the fees. The series of e-mails by the petitioners, without any interference from the respondent, showed that the petitioners did not object to the agreement on fees that the respondent had with their late father. Further, the petitioners knew that the respondent was privy to those e-mails. (paras 11, 16 & 24)

(2) The first petitioner's failure to object, once he was informed of the fees, meant that he gave unequivocal acceptance and approval of the agreement, upon which the respondent had relied. As such, to renege on the agreement was inequitable and malicious. (para 16)

(3) The imposition of the fees of 2.5% of the award was not unreasonable. The 2.5% rate was proposed by the petitioners' father himself, to which the respondent agreed. No malice was shown on the part of the respondent. The petitioners' father had proposed the percentage and the petitioners had maintained this agreement throughout the land reference proceedings without any objection whatsoever. The petitioners must be estopped from denying the existence of the agreement to pay the respondent the said amount of fees. Further, the sixth schedule of the Solicitors' Remuneration Order 2005 was irrelevant as it applied to non-contentious matters (*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd*; refd). (paras 17-23)

(4) If the petitioners had relied solely on s. 126 of the Act, they would not have prayed for a bill of costs to be drawn up and delivered to them. Instead, they would have merely prayed for the bills to be taxed. In *Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd*, it was decided that if a gross sum bill was delivered, the party chargeable therewith may require the advocate and solicitor to deliver to him *in lieu* of the cost a bill containing detailed items before the expiration of three months from the date of the delivery, corresponding with s. 121 of the Act. If no such request for a detailed bill of costs was made within that time period, the party chargeable was barred from petitioning that the bill of costs be taxed. (para 25)

(5) Since the petitioners never requested for a bill of costs as specified in O. 59 r. 7 and Form 117 of the Rules of Court 2012 within three months from the date of delivery of the gross sum bill dated 26 January 2013, the petitioners were therefore barred from petitioning for taxation of the said bill or to request for a detailed bill of costs. As such, this petition which was filed on 31 July 2013 was out of time and misconceived in law. (paras 25-27)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Chai Chee Chin & Ors lwn. Tetuan Zahari Ong & Co [2006] 8 CLJ 84 HC ***(refd)***

Lee Hiok Ping & Ors v. Lee Hiok Woon & Lee Hiong Tng & Ors [1989] 1 CLJ 297; [1989] 2 CLJ (Rep) 1006 ***(refd)***

Shamsudin Embun v. PT Seah & Co [1986] 1 LNS 119 HC ***(refd)***

Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd [1999] 1 CLJ 239 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 116(1), (2), 121, 126

Rules of Court 2012, O. 59 r. 7

For the petitioners/respondent - Gurmit Singh Swaran Singh; M/s Fatimah, Kei & Leong

For the respondent/appellant - Aimee Liew Sak Harn (Au Yong Wai Nyan with her); M/s YH Teh & Quek

Reported by Kumitha Abd Majid

JUDGMENT

Zaleha Yusof J:

[1] This is an appeal by the respondent against the decision of the Senior Assistant Registrar in allowing the petitioners' petition for the following prayers:

(a) That the respondent be ordered to do and deliver their bill of costs to the petitioners; and

(b) That the said bills be referred to the Deputy Registrar of the High Court to be taxed and resolved with the usual directions.

[2] The respondent is a firm of solicitor. It had been engaged by the petitioners' father in April 2011 to act on a matter pertaining to the compulsory acquisition of three lots of land belonging to the petitioners' father. The three land acquisitions took place within a span of 19 to 29 years before the respondent was engaged. At that point of time when the respondent was engaged, only one out of the three acquisitions was referred to court by the land administrator; ie, land reference No. S-15-20-1989 9 (1989 land reference).

[3] Although at the time of appointment, 22 years had lapsed, the said 1989 land reference had yet to be disposed off. A

[4] After its appointment, the respondent had managed to get two other acquisitions be referred to court ie, Land Reference No. S-15NCVC-26-2011 (2011 Land Reference) and S-15NCVC-1-01-2012 (2012 land reference). The 2011 land reference was the first to be disposed off, on 28th March 2012, and the respondent sent a bill of cost to the petitioners' father for the sum of RM97,855. On 19 April 2012, it was agreed between the respondent and the petitioners' father, that the respondent's bill be reduced to RM82,855. The reduced sum amount to approximately 5.3% of the compensation received by the petitioners' father, which was RM1,562,989.84. B C

[5] The petitioners' father passed away on 25 July 2012. Pending a grant of probate, the petitioners were appointed representatives for both the remaining land reference. The respondent continued to act as their solicitors until the completion of the court hearing and the court's decision on 28 December 2012. The respondent served its bills of costs dated 26 January 2013 on the petitioners. On 31 July 2013, the petitioners filed the application for the bills to be taxed. D

[6] It is the respondent's contention that its legal fees were based on 2.5% percentage basis on the award that was awarded by the court as agreed by the petitioners' father through the second petitioner as shown in an email dated 23 May 2012, exhibited as AL-2 of encl. 4. E

[7] On the other hand, the petitioners contend that the charging of the fees on the said percentage basis is against the law and that there was no signed agreement pursuant to s. 116(1) and (2) of the Legal Profession Act 1976 (Act 166). F

[8] This petition was filed based on s. 126 of Act 166.

Issues

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[9] (i) Whether there was an agreement to pay the respondent its legal fees which was equivalent to 2.5% of the compensation received by the petitioners' father; and (ii) Whether this petition is misconceived.

Decision

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[10] I have perused the cause papers and submissions made by the parties. On the issue of the agreement, s. 116 of Act 166 provides as follows:

> 116 Advocate and solicitor may enter agreement for costing contentious business
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> (1) Subject to the provisions of any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to I

A be done by such advocate and solicitor, either by a gross sum, or otherwise, and either at the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.

(2) Every such agreement shall be signed by the client and shall be subject to this Part.

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[11] It is not disputed that there was no formal agreement entered into between the respondent and the petitioners' father. However, I am of the view that that alone cannot be used as an argument to deny the respondent of its fees. There is nothing in Act 166 which requires formal agreement to C be entered and signed. In this modern era, email is a good communication tool between parties. Direction or instruction is often given and taken by emails. For all its purpose and function, emails help to expedite matters. In this instant case, evidence shows that parties had at least in three occasions, one before the passing of the petitioners' father and two after that, agreed to D the arrangement or the agreement. In exh. AL-2, the second petitioner had on 23 May 2012 (before the death of the petitioners' father), *inter alia*, stated the following:

> Have agreed with Aimee (the respondent's partner) on a 2.5% nett fee/ cost based on additional compensation for the 2nd and 3rd acquisitions.

E **[12]** After their father passed away, the first petitioner who is also known as ('John') sent an email dated 23 October 2012 addressed to the respondent and the second petitioner ('Nelson') at midnight asking what the respondent's total charges would be to conduct the land references. Within 15 minutes, ie, at 0015 hours, the second petitioner' replied the first F petitioner, stating in no uncertain terms the following words:

> John,
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> Dad has agreed on 2.5% of the award.
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> Nel

G **[13]** This, as submitted by the respondent would be the second confirmation of the agreement.

[14] Again on the same day, at 9.30am, the first petitioner subsequently asked the second petitioner if this was agreed in writing, to which the second petitioner replied with the following words:

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> John
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> It was agreed upon after the 3rd acquisition hearing was concluded. While it was not in writing, the verbal agreement of Dad has to be honoured.

I **[15]** The entire conversation on 23 October 2012 is exhibited in exh. 'AL-4' of encl. 4. No objection was forthcoming from the petitioners on the agreement at any point prior to the hearing of the land references which

took place on 9 November 2012; neither did the petitioners decide to discharge the respondent as their solicitors for these land references. Even after the court's decision on 28 December 2012, there was still no objection.

[16] The petitioners, in paras. 18-25 of the petitioners' submissions, have suggested that the respondent should obtain a reaffirmation from the petitioners with regards to the agreement on fees. Looking at the abovementioned series of emails, I have no doubt that the petitioners clearly had given their reaffirmation. The series of emails by the petitioners on 23 October 2012, without any interference from the respondent, showed that the petitioners did not object to the agreement on fees that the respondent had with their late father. The petitioners also knew that the respondent was privy to those emails. Hence, the first petitioner's failure to object, once he was informed of the fees, meant, as submitted by the respondent, that he gave unequivocal acceptance and approval of the agreement, upon which the respondent has relied. I therefore agree with the respondent that to renege on the agreement is inequitable and malicious.

[17] The petitioners referred to *Shamsudin Embun v. PT Seah & Co* [1986] 1 LNS 119; [1988] 2 MLJ 546. However, as submitted by the respondent and I agree, this case is not applicable to this instant case. First, the facts of that case show that the agreement was uncertain in scope. This is not the same as the facts of the instant case. The agreement was clear; fees and disbursements to the value of 2.5% of the award for each land reference.

[18] Secondly, the facts of that case not only showed that the work was regarded as simple, eg, there being no trial conducted, but that the solicitor had wasted time in prosecuting his client's claim. Upon such delay by the solicitor, it was clear that the fees were unreasonable. However, this is not so on the instant facts. Instead, the respondent has made every effort to expedite matters, despite the petitioners' late father not having followed up on his own matter for over 20 years. The work done throughout the entire proceedings is clearly far more than what was done in the *Shamsudin (supra)* case.

[19] The petitioners also pointed out the case of *Lee Hiok Ping & Ors v. Lee Hiok Woon & Lee Hiong Tng & Ors* [1989] 1 CLJ 297; [1989] 2 CLJ (Rep) 1006; [1989] 1 MLJ 156. Suffice to say that on the facts of that case, no agreement was made between the parties as to fees, and as such, the court had only to consider the reasonableness of the fees charged.

[20] However, in the instant case, the 2.5% rate was proposed by the petitioners' father himself, to which the respondent agreed. No malice was shown on the part of the respondent. It is obvious, from the fact that the petitioners' father had proposed the percentage, and that the petitioners had maintained this agreement throughout the land reference proceedings without any objection whatsoever, that the fees are reasonable and acceptable. To argue otherwise now smacks of malice and inequity.

[21] I also agree with the respondent that the sixth schedule of the Solicitors Order 2005, which the petitioners have referred to, is utterly irrelevant, as it applies to non-contentious matters.

[22] To me, the imposition of fees of 2.5% of the award is not unreasonable as in *Chai Chee Chin & Ors lwn. Tetuan Zahari Ong & Co* [2006] 8 CLJ 84, the High Court upheld an agreement for fees of 20% of the award of compensation for the said land acquisition matter. Further, as I have stated in para. 4 above, in the 2011 land reference which was first disposed off, the petitioners' father had agreed to pay the respondent its legal fees which was equivalent to approximately 5.3% of the compensation received by the petitioners' father.

[23] I am of the view after having due regard to all the circumstances of this case, the petitioners must be estopped from denying the existence of the agreement to pay the respondent the said amount of fees. Refer to the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

[24] I therefore conclude that the exchange of emails clearly show that there was an agreement to pay the respondent its legal fees which was equivalent to 2.5% of the compensation received by the petitioners' father.

[25] On the issue as to whether the petition is misconceived, it must be noted that the basis of this petition is s. 126 of Act 166. If the petitioners had relied solely on s. 126 of Act 166, the petitioners would not have prayed for a bill of costs to be drawn up and delivered to the petitioners. Instead, the petitioners would have merely prayed for the bills to be taxed. As submitted by the respondent, this distinction is very important because, according to the decision of the late Augustine Paul J (as His Lordship then was) in *Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd* [1999] 1 CLJ 239, if a gross sum bill is delivered, the party chargeable therewith may require the advocate and solicitor to deliver to him *in lieu* of the cost a bill containing detailed items before the expiration of three months from the date of the delivery, corresponding with s. 121 of the Act. If no request for a detailed bill of cost is made within that time period, the party chargeable is barred from petitioning that the bill of costs be taxed.

> The law enshrined in s. 121 is therefore clear. The solicitor's bill of costs may at his option either contain detailed items or be for a gross sum. Pursuant to s. 121(1)(a) the party chargeable upon whom a gross sum bill has been delivered may require the advocate and solicitor to deliver to him *in lieu* of the cost a bill containing detailed items, and the gross sum bill shall thereupon be of no effect. Upon delivery of the bill containing the detailed items the party chargeable may, if he desires to have the bill taxed, by petition obtain an order to that effect as provided by s. 126(1). If he does not take any action after having received the bill containing the detailed items then the sanctions contained in ss. 126(1)

and 128(1) shall apply. On the other hand if the party chargeable does not take any step after service on him of the gross sum bill and an action is commenced for the recovery of the costs, his only remedy is to request for an order of taxation within a period of one month from the service on him of the writ or other originating process claiming for the costs. The taxation shall be on the gross sum bill as provided by s. 121(1)(b) and (c). Needless to say, he would have lost his right to a bill containing detailed items.

[26] Consequently, I agree with the respondent that as the petitioners had never requested for a bill of costs as specified in O. 59 r. 7 and Form 117 of the Rules of Court 2012 within three months from the date of delivery of the gross sum bill dated 26 January 2013, the petitioners are therefore barred from petitioning to this court for taxation of the gross sum bill, or to request for a detailed bill of costs. This petition which was only filed on 31 July 2013 is out of time.

[27] On that basis, I also agree with the respondent that this petition is misconceived in law and should be dismissed with costs, since the petitioners are now out of time from petitioning this court for taxation of the gross sum bills dated 26 January 2013.

Conclusion

[28] Based on the above, this appeal is allowed with cost.